SINGLE BENCH

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(1)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P. No. 1804/2005

PETITIONER
PLAINTIFF

Rakesh Tiwari, Aged about 39 years, S/o. Shri Sudarshan Tiwari, R/o. M.I.G. 22, Veer Sawarkar Nagar, Heerapur, Tahsil & District Raipur (C.G.)

VERSUS

RESPONDENT
DEFENDANT

M/s. Ashok Ley Land Finance Limited, Through Branch Incharge, Babla Complex, Near Coffee House, G.E. Road, Raipur, District Raipur (C.G.)

P.R. No. 1887/05
Presented by Shri A.U. Shirdhankar
dated 27.09.05

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF AN APPROPRIATE WRIT IN THE NATURE OF MANDAMUS/ CERTIORARI, ETC. OR DIRECTION / ORDER IN THE LIKE NATURE ETC.

To,

THE HON'BLE CHIEF JUSTICE AND HIS HON'BLE COMPANION JUDGES OF THE HON'BLE HIGH COURT OF CHHATTISGARH AT BILASPUR.

MAY THIS PLEASE TO YOUR LORDSHIPS,

The humble petition of the petitioner Named above, mot respectfully showeth :-

HIGH COURT OF JUDICATURE AT BILASPUR

(CHHATTISGARH)

Writ Petition No.579 of 2005

Ashok Leyland Finance Ltd.

- Versus -

Rakesh Tiwari

Writ Petition No.1804 of 2005

Rakesh Tiwari

- Versus -

Ashok Leyland Finance Ltd.

POST FOR ORDER ON 2nd AUGUST, 2005

Sd/-
L.C. Bhadoo
Judge

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.579 of 2005

Ashok Leyland Finance Ltd.

- Versus -

Rakesh Tiwari

Writ Petition No.1804 of 2005

Rakesh Tiwari

- Versus -

Ashok Leyland Finance Ltd.

Present: -

Smt. Fouzia Mirza, Advocate:	For petitioner in W.P. No.579/05 for respondent in W.P.1804/2005
Shri Rajesh Pandey, Advocate:	For petitioner in W.P. No. 1804/2005
Shri Sachin S. Rajput, Advocate:	For respondent in W.P. No. 579/05.

O R D E R

(Passed on 24 August, 2005)

Before Hon'ble Mr. L.C. Bhadoo, J.

1. Writ Petition No.579/2005 filed by Ashok Leyland Finance Ltd against Rakesh Tiwari & Writ Petition No.1804/2005 filed by Rakesh Tiwari against Ashok Leyland Finance Ltd. are connected with each other and relates to same issue, therefore, they are being disposed of by this common order.

2. Brief facts necessary for disposal of these petitions are that M/s Ashok Finance Limited, having its branch office at Raipur and main office at Chennai engaged in financing the vehicles purchased by the general public. Accordingly, Rakesh Tiwari-plaintiff in the suit (hereinafter shall be referred as 'the plaintiff')

contacted the Ashok Leyland Finance Ltd- defendant in the suit (hereinafter shall be referred as 'the defendant') for financing the vehicles and accordingly, the defendant financed an amount of Rs.6 Lac against the truck No.CG04-9619 to the plaintiff and entered into a hire purchase agreement on 28.3.2001. The total value of the agreement was Rs.7,39,000/- inclusive of all the charges. The defendant had also financed another truck bearing registration number CG04-ZC-3393, hire purchase agreement was executed on 31.1.2002 and the total value of agreement was Rs.131,520/-. Thereafter, the plaintiff started paying installments. The plaintiff's case before the trial Court was that against the first hire purchase agreement he paid in all Rs.7,16,982/- including Rs.11,000/- of the insurance amount and only an amount of Rs.23,018/- was outstanding against the plaintiff against Agreement No.1, out of which he paid Rs.4,500/- on 28.5.2004 thereby only Rs.18,518/- remained unpaid against the first agreement. On 7.7.2004 the plaintiff went to the office of defendant to pay the remaining amount of Rs.18,518/- against the first agreement and Rs.19,040/- against the second agreement, the defendant gave the statement of account dated 22.6.2004 to the plaintiff according to which an amount of Rs.1,39,099.99 paise was outstanding against the plaintiff against the first agreement and Rs.50,429.99 paise was outstanding against the second agreement. On the same day when the plaintiff was giving explanation to the defendant, the plaintiff's truck bearing registration number CG04-9619 was stopped by the defendant and defendant started threatening that if the said amount is not paid then the vehicle will be repossessed. The plaintiff stated that

entire amount has been paid to the defendant and they had wrongly calculated the outstanding amount. Ultimately, the defendant agreed that if Rs.50,000/- is paid against the loan of both the trucks then the truck in question will be released and thereafter, no amount will remain as unpaid. On this the plaintiff paid Rs.50,000/- through a post dated cheque and approached the defendant on 12.7.2004 for issuance of "no objection certificate", but the defendant had refused to give "no objection certificate". When "no objection certificate" was not given, the plaintiff filed a civil suit in the Court of learned 3rd Civil Judge Class-II, Raipur on 13.7.2004 for injunction to the effect that no amount is outstanding against the plaintiff against the said two agreements and the defendant be prohibited from taking any truck in their possession or sale. Along with the suit an application under Order 39 Rules 1 & 2 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter shall be referred as 'the Code') was also filed.

3. After service of the summons of the said civil suit, the defendant appeared before the Court below on 31.7.2004 and filed a detailed reply to the application filed by the plaintiff under Order 39 Rules 1 & 2 read with Section 151 of the Code. On 8.12.2004 the defendant filed an application under Section 151 of the Code raising objection with regard to the maintainability of the suit on the ground that there is an arbitration clause in the hire purchase agreement. After hearing learned counsel for the parties, learned trial Court while disposing of the application of plaintiff filed under Order 39 Rules 1 & 2 read with Section 151 of the Code and the application filed by the defendant under Section 151 of the Code

allowed the application of plaintiff and directed the defendant to restore the possession of the plaintiff's vehicle number CG04-9619, which was taken into repossession on 24.7.2004 during the pendency of the suit by the defendant finance company. The trial Court further restrained the defendant not to stop another vehicle of the plaintiff bearing registration number CG04-ZC-3393. The learned Civil Judge rejected the application of the defendant filed under Section 151 of the CPC also by the same order. Being aggrieved by the said order the petitioner herein/defendant filed a writ petition bearing W.P.579/2005 before this Court questioning the legality, propriety and correctness of order dated 3.1.2005. However, after filing of this writ petition the petitioner herein has also filed a miscellaneous appeal on 11.1.2005 before the learned District Judge, Raipur against the same order and that appeal came to be registered as M.C.A. No.6/2005. The said appeal was transferred to the Court of learned 1st Additional District Judge, Raipur, who allowed the said appeal vide order dated 21.4.2005, set aside the order dated 3.1.2005 passed by the trial Court in respect of issuance of temporary injunction and rejected the application filed by the plaintiff/respondent herein under Order 39 Rules 1 & 2 read with Section 151 of the Code. Against the said order the plaintiff has preferred a writ petition before this Court bearing W.P.No.1804/2005 questioning the legality, propriety and correctness of order dated 21.4.2005 passed by learned 1st Additional District Judge, Raipur thereby reversing the order passed by learned trial Court on 3.1.2005.

4. I have heard learned counsel for the parties. In the first instance, I will take up the Writ Petition No.579/2005.

5. Smt. Fouzia Mirza, learned counsel for the petitioner/defendant argued that in Clause (18) of hire purchase agreement a provision has been made that in case of any dispute arising under the agreement the same shall be referred to an Arbitrator at the option of the owner and accordingly, the petitioner/defendant moved an application under Section 151 of the Code on 8.12.2004 raising objection that there is an arbitration clause in the hire purchase agreement and this suit has been filed against the said provision, therefore, it is not maintainable and also the application moved by the plaintiff Order 39 Rules 1 & 2 read with Section 151 of the Code is liable to be rejected on this ground alone. She further argued that in view of the clause (18) of the agreement the trial Court ought not to have decided the application of the plaintiff for temporary injunction and ought to have referred the parties to the Arbitrator for arbitration.

6. On the other hand, Shri Sachin Singh Rajput learned counsel for the respondent argued that in the first instance, the Arbitrator was to be appointed at the option of the Owner i.e. the defendant, but the defendant had not appointed any Arbitrator and repossessed the vehicle without intervention of the Court, therefore, the plaintiff was forced to file the civil suit on account of illegal action of the defendant i.e. taking into repossession of the vehicle of the plaintiff. He further argued that the application filed by the defendant under Section 151 of the Code was not in accordance with the provisions of Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter shall be referred as "the Act of 1996"), therefore, the same has rightly been rejected by the trial Court.

7. Having heard learned counsel for the parties, I have perused the hire-purchase agreement as well as other documents, pleadings of the parties and also the application filed by the defendant under Section 151 of the Code.

8. It is true that in Clause 18 of the agreement there is a provision regarding referring the matter to arbitration at the option of the owner i.e. finance company in case any dispute between the parties arising under the agreement. In this connection, if we look into the provisions of Section 8 of the Act of 1996 which envisages that:

> **"8. Power to refer parties to arbitration where there is an arbitration agreement- (1)** A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, *if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration*.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Accordingly, a judicial authority while dealing with the matter which is the subject matter of an arbitration agreement shall refer the parties to the arbitration only when:

a. a party should apply before the judicial authority not later than when submitting his first statement on the substance of the dispute.

b. the said application must be accompanied with original arbitration agreement or a duly certified copy thereof.

If any application found lacking in any of the above conditions then the Court is not obliged to refer the parties to the arbitration and I am fortified in my view by the judgment of the Hon'ble Apex Court in the matter of **Sukanya Holdings (P) Ltd. Versus Jayesh H. Pandya and another** reported in **(2003) 5 Supreme Court Cases 531** wherein the Court while interpreting Sections 5 & 8 of the Act of 1996 held that:

> "Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if: (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections (1) and (2) of Section 8 of the Act."

9. In the light of above provision, if we look into the application (Annexure P-5) filed by the defendant/petitioner herein under Section 151 of the Code on 8.12.2004, in this application simply it

was mentioned that there is a hire purchase agreement executed between the parties, in that agreement there is a provision for arbitration and the plaintiff has requested for injunction against that arbitration clause, therefore, the suit as well as the application filed under Order 39 Rules 1 & 2 read with Section 151 of the Code by the plaintiff are not maintainable. But, I am of the considered opinion that this application was rightly rejected by the trial court, for the reason that the said application was not clothed with the original arbitration agreement or duly certified copy thereof as per provision of sub-section (2) of Section 8 of the Act of 1996 and also for another reason that sub-section (1) contemplates that " ***if a party so applies not later than when submitting his first statement on the substance of the dispute***" and the defendant/petitioner herein in response to the summons of the civil suit filed by the plaintiff/respondent herein put in appearance on 31.7.2004, filed a detailed reply (Annexure P-4) of the application filed by the plaintiff under Order 39 Rules 1 & 2 of the CPC and in this reply no objection was raised by the petitioner herein regarding maintainability of the suit or referring the parties to the arbitration or that there is any arbitration clause in the hire purchase agreement. This reply contains four pages and refers to the whole dispute, regarding non-payment by the plaintiff, advancement of loan and payment of installments by the plaintiff/respondent herein. If we look into this reply then it shows that the defendant in this reply raised full defence and gist and essence of this reply is as good as written statement of the plaint. Therefore, I am of the opinion that above statement filed by the defendant/petitioner herein in reply to the application filed by the

plaintiff under Order 39 Rules 1 & 2 read with Section 151 of the Code falls in the category of first statement on the substance of the dispute, therefore, the petitioner herein/defendant had not filed application in conformity with the Section 8 of the Act of 1996 before filing of this reply or at the time of filing of this reply. Even the application under Section 151 of the Code was filed much later i.e. on 8.12.2004, therefore, as per above cited decision of the Hon'ble Apex Court, the trial court was not required to stay the proceedings and refer the parties to the arbitration. Learned counsel for the petitioner herein relied on the decision of Madhya Pradesh High Court rendered in the matter of **Brahan Dutt Shukla V. Ashok Leyland Finance** reported in **2004 (2) JLJ 185**, but on facts the said judgment is of no help to the petitioner herein, as the facts of that case were entirely different from the present case. In that case the Ashok Leyland Finance had already appointed the Arbitrator and when arbitration proceedings were going on the said Brahan Dutt Shukla, the borrower filed a suit before the Civil Court at Jabalpur for permanent injunction alongwith an application under Order 39 Rules 1 & 2 of the Code for declaration and injunction that defendant/respondent be injuncted from initiating the arbitration proceedings as mentioned in the notice dated 16.12.2000 at Chennai, whereas, in the present matter, the petitioner herein/defendant has not exercised his option of appointing the Arbitrator as per clause –18 of the hire purchase agreement, secondly, even the application was not filed by the defendant/petitioner herein in conformity with the Section 8 of the Act of 1996 before or at the time of filing of the reply to the said application filed by the plaintiff and as the petitioner

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herein/defendant has already filed the first statement on the substance of the dispute on 31.7.2004, now the defendant is not entitled to file any application.

10. Learned counsel for the petitioner also argued that now the petitioner has filed an application under Section 8 of the Act of 1996 before the trial Court, but for the foregoing reasons the petitioner has already filed the statement on the substance of the dispute, therefore, now filing of application under Section 8 of the Act of 1996 is meaningless. Moreover, we do not know whether this second application is in conformity of Section 8 or not.

11. As far as Writ Petition No.1804/2005 filed by the plaintiff- Rakesh Tiwari questioning the legality, propriety and correctness of order dated 21.4.2005 passed by learned 1st Additional District Judge, Raipur in Misc. Civil Appeal No.6/2005 is concerned, by this order learned Additional District Judge while allowing the appeal of defendant set aside the order dated 3.1.2005 passed by the learned Civil Judge whereby he granted temporary injunction in favour of the plaintiff directing the respondent/defendant to restore the possession of the plaintiff's truck bearing registration number CG04-9619. *It is settled law that appellate Court in miscellaneous civil appeal filed against an interim order passed by the trial court can interfere only when the order is perverse, against the settled principles of law and contrary to the documents & material available on record*. The Hon'ble Apex Court in the matter of **Sree Jain Swetambar Terapanthi Vid(S) V. Phundan Singh and others** reported in **AIR 1999 Supreme Court 2322** held that:

> "It is one thing to conclude that the trial Court has not recorded its prima facie satisfaction on merits but

granted temporary injunction and it is another thing to hold that trial Court has gone wrong in recording the prima facie satisfaction and setting aside the finding on the basis of the material on record because it has not considered the relevant material or because it has erroneously reached the finding or conclusions on the facts established. In the first situation, the appellate Court will be justified in upsetting the order under appeal even without going into the merits of the case but in the second eventuality, it cannot set aside the impugned order without discussing the material on record and recording a contrary finding...."

12. Based on the above principle, if we look into the facts of this case, the plaintiff/petitioner herein filed a civil suit for mandatory permanent injunction against the respondent/defendant directing them to restore the possession of truck No.CG04-9619, which was illegal repossessed by the defendant on 24.7.2004 despite the fact that whole loan amount was repaid by the plaintiff and further the defendant be directed not to take possession of another truck bearing registration number CG04-ZC-3393. The case of the plaintiff before the trial court was that the defendant/respondent herein advanced a loan of Rs.6 Lac to plaintiff/petitioner herein against the truck No.CG04-9619 and Rs.1,17,000/- was estimated as interest, which was to be repaid in 35 installments by the plaintiff and also Rs.11,000/- of insurance charges. The defendant/respondent herein had also advanced a loan amount of Rs.1 Lac to the plaintiff against another truck No.CG04-ZC-3393, interest on that amount was estimated to the tune of Rs.23,520/- and the whole amount was to be repaid by the plaintiff in 23 installments. The plaintiff's further case was that he paid almost all the amount and only Rs.23,018/- was outstanding against the

first contract and Rs.19,040/- was outstanding against the second contract. On 28.5.2004 the plaintiff further paid Rs.4,500/- against the first contract and thereby only Rs.18,518/- was remained outstanding. When on 7.7.2004 the plaintiff went to the office of defendant/respondent herein for final settlement of loan account, he was informed by the defendant that an amount of Rs.1,39,099.99 paise is still outstanding. When the plaintiff was explaining to the defendant/respondent that the outstanding amount has been wrongly calculated, in the meantime, the defendant/respondent stopped the truck of the plaintiff/petitioner bearing registration number CG04-9619, on which a settlement was arrived at between the plaintiff & the defendant and the defendant company directed the plaintiff that if he deposits Rs.30,000/- against the first contract and Rs.20,000/- against the second contract towards full & final settlement then the truck will be released, accordingly, the plaintiff paid the whole amount and the vehicle was released. Thereafter, when the plaintiff went to office of defendant to take "no objection certificate", they refused to give the same and again repossessed the plaintiff's truck bearing number CG04-9619 illegally on 24.7.2004 and ultimately, he filed the civil suit. Therefore, the case of the plaintiff was that he paid all the loan amount due rather he paid more than the required amount to the defendant company and nothing was left out, even then the defendant had illegally repossessed his truck. The trial court considering all these aspects of the matter reached to the conclusion that there is a prima facie strong case in favour of the plaintiff and therefore, granted temporary injunction in favour of the plaintiff.

13. Learned counsel for the respondent/defendant argued that as the plaintiff/petitioner herein did not pay the installments in time, therefore, as per the clause (10) of the hire purchase agreement the respondent was entitled to charge interest @ 36% per annum, as such the amount of Rs.1,39,099.99 was outstanding against the petitioner and therefore, the defendant/respondent herein has rightly repossessed the truck of the petitioner herein.

14. The appellate Court in Paragraph-11 of the order has wrongly held that truck in question was taken into possession on 7.7.2004, whereas the civil suit was filed on 13.7.2004. It is correct that the suit was filed on 13.7.2004 but the truck was again taken into re-possession on 24.7.2004 during the pendency of suit and for which the plaintiff amended his plaint and thereafter, the temporary injunction was issued in the mandatory form against the respondent. The other finding of the appellate Court was that the plaintiff can take the repossession of truck after making payment of loan amount and as such no irreparable injury would be caused to the plaintiff. Accordingly, the prima facie case was not made out in favour of the plaintiff, balance of convenience was also not in favour of the plaintiff and the plaintiff was not able to prove the fact that if the injunction is not granted then how he will suffer irreparable loss. This finding of the appellate Court is wholly perverse and contrary to the facts and records, for the reason that when the whole agreed amount has been paid by the plaintiff as per agreement, then he had got a strong prima-facie case in his favour. The only grievance of the defendant was that some installments were not paid in time, therefore, respondent was entitled to charge penal interest @ 36% per annum, but on this

ground it cannot be said that the plaintiff has no prima facie case in his favour, when the plaintiff has repaid the whole principal amount plus agreed interest and the only dispute left was that the plaintiff did not pay the penal interest which was due on account of late payment of the installments, which could have been decided in the suit. So far as the balance of convenience is concerned, that is also in favour of the plaintiff when he paid the whole amount and as per averments made in the plaint, when the vehicle was stopped, as agreed between the parties, the plaintiff paid Rs.50,000/- to the defendant towards the final payment and thereafter, the vehicle was released, but again repossessing of the vehicle by the defendant cannot be held to be a justified ground, therefore, the balance of the convenience was also in favour of the plaintiff. So far as question of irreparable loss is concerned, as has been held by the trial Court that if the truck in question is repossessed and remain idle for long time then the plaintiff is definitely going to suffer irreparable loss, as he will lose his earnings, truck will become junk in due course of time and the loss suffered by the plaintiff cannot be made good in any form. Therefore in view of the above, as per settled law there were no grounds before the appellate Court to interfere with the discretionary order passed by the trial Court based on the material on record. The trial Court order cannot be termed to be a perverse or contrary to the settled principles of law or material on record.

15. Now coming to the question that whether in the facts and circumstances of the case the trial Court was right in granting ad-interim mandatory temporary injunction in favour of plaintiff, in this connection, the Hon'ble Apex Court in the matter of **Deoraj Vs**

State of Maharashtra and others reported in **(2004) 4 Supreme Court Cases 697** held that:

> " Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima-facie case- of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms and may be prudent."

16. In the present case, the plaintiff has paid the whole amount as per agreement and truck of the plaintiff was released, but after filing of civil suit the defendant has again repossessed the truck and if the interim relief was not granted then the facts and circumstances of

the case shows that the same would amount to dismissal of the suit, as the defendant may dispose of the truck or it will become junk, the plaintiff will be deprived of his earnings through the said truck and thereby he will be ruined, on the contrary if the case of the defendant is accepted, as it is, then only penal interest amount is remained unpaid and that will be recovered if the suit fails, therefore, refusal to issue injunction would have prick the conscience of the Court and do violence to the sense of justice and it would result in injustice being perpetuated throughout the hearing, as the suit is bound to take years to reach to its final decision and if during the course of hearing the truck would remain idle then it will become junk. Moreover, when the principal amount plus interest was already paid by the plaintiff, in view of the above principle laid down by the Hon'ble Apex Court, the trial Court was right in granting ad-interim mandatory injunction against the respondent.

17. Now coming to the question that the truck in question was on hire purchase; as per hire purchase agreement executed between the parties and as per clause (10) of hire purchase agreement in case of default the respondent/defendant was entitled to take the repossession of the vehicle. In fact, perusal of agreement shows that this agreement was entered into between the plaintiff and the defendant just to secure the loan amount which was advanced by the defendant to the plaintiff against the two trucks, it is not a case where the trucks in question were sold by the defendant to the plaintiff with a right to repossess the same in case if any default is made by the plaintiff. Hire-purchase agreement is the one under which an owner hires goods to a hirer, giving the hirer

person borrows money and pays it to vendor, transaction between the customer and the lender will be a loan transaction in a hire-purchase agreement, the hirer is under no obligation to buy. Where the customer is himself the owner and with a view of finance his purchase, he enters into an agreement in the form of hire purchase agreement, it will be a loan transaction. In the present case, the defendant-Ashok Leyland Finance Ltd. is not a dealer of motor vehicles but is an independent business of finance, the vehicle was purchased in the name of plaintiff and he is real owner of the trucks. A similar question was before the Hon'ble Apex Court in the matter of **Sundaram Finance Ltd. V The State of Kerala and another** reported in **AIR 1966 Supreme Court 1178** where the finance company was liable to pay the sales tax on transferring the goods on hire-purchase basis, as said transfer would amount to sale. After interpreting the identical agreement the Hon'ble Apex Court held that *"the intention of parties was only to secure payment and label of hire purchase was not conclusive and a hire purchase agreement should be read as a loan agreement only"*. The Court further held that *"it is also to be noted that the agreement does not contemplate exercise of an option on payment a nominal sum of money as is to be found in other hire purchase agreements. Execution of the promissory note, the hire purchase agreement and the other documents, our judgment, indicate that it was the intention of the parties not to transfer any interest in the vehicle by the customer to the appellant: it was intended to give security by hypothecating the vehicle in favour of the appellants and for ensuring repayment of the loan advanced that the customer submitted to the various onerous conditions of the hire purchase*

agreement." On the identical agreement the Punjab & Haryana High Court in the matter of **Tarun Bhargava V State of Haryana** reported in **AIR 2003 Punjab and Haryana 98** held that " *the agreement in the present case is held to be a loan agreement and rights of the creditor are held to be those of a hypothecatee, rights of the parties under the agreement would be different. A hypothecatee, as already held, cannot take possession of the security without intervention of the court, though he has a right to take possession or to sell the hypothecated property through Court or to give notice to the hypothecator to enforce the security."* In the present case the defendant took into possession of the truck in question without giving any notice to the plaintiff, particularly, when, as per averments made in the plaint, the matter was settled between the parties and Rs.50,000/- was paid by the plaintiff to the defendant towards full & final payment, as a result of which the repossessed truck was released by the defendant, but the defendant has again repossessed the truck, therefore, in the facts and circumstance of the case when the principal amount plus interest was paid by the plaintiff to the defendant, the defendant was not entitled to take repossession of the truck without giving notice to the plaintiff and without intervention of the Court, however, the defendant shall be at liberty to move the Court for recovery of the remaining amount. Even otherwise, the Hire Purchase Act, 1972 has already been repealed by the Parliament in the year 2005.

18. Learned counsel for the respondent argued that as per provisions of Section 9 of the Act of 1996 the plaintiff ought to have moved to the Competent Court as defined under the Act of 1996, the suit was not filed before the appropriate Court, therefore, no case was

made out for grant of interim measures as per provisions of Section 9 of the Act of 1996. But, looking to the facts and circumstances of the present case the above arguments of learned counsel for the respondent is misconceived, for the reason that the provisions of Section 9 are attracted only when a party, before, or during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court for interim measures. In this case, the plaintiff or defendant so far never applied for the arbitration proceedings neither they were intended to go for the arbitration, as the arbitration proceedings could have been commenced at the option of the respondent only. The plaintiff filed the suit on account of tortuous action of the respondent when his truck was stopped even after paying the principal amount plus interest, as agreed between the parties, therefore, the provisions of Section 9 of the Act of 1996 were not attracted in the present case. Learned counsel for the respondent cited certain judgments on this aspect but the same are not being relevant, therefore, they are not being referred here.

19. In view of the above, I am of the considered opinion that the respondent/defendant has not exercised his option as per clause-18 of hire purchase agreement to go for arbitration, even after filing of the suit by the plaintiff and till the submission of first statement on the substance of dispute, the defendant had not moved any application in accordance with the provisions of Section 8 of the Act of 1996, therefore, the trial Court has rightly not referred the parties to the arbitration. So far as the grant of ad-interim mandatory temporary injunction against the defendant for

restoration of truck is concerned, the appellate Court was not correct in interfering with the order passed by the trial Court that too by mentioning incorrect facts.

20. In the result, Writ Petition No.579/05 filed by the defendant-Ashok Leyland Finance Ltd. is dismissed being devoid of merit and Writ Petition No.1804/2005 filed by the plaintiff-Rakesh Tiwari against the order of appellate Court is allowed, order dated 21.4.2005 whereby the appellate Court allowed the appeal filed by the respondent/defendant is set aside. The order passed by the trial Court dated 3.1.2005 is hereby restored.

Sd/-
L.C.Bhadoo
Judge

Roshan/-